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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

FRED J. LAUCHLI, Trustee of Hartman Corporation of America (a Corp.), Bankrupt, Petitioner, vs. MILTON HARTMAN, JANE I. HARTMAN, DuVOLL CORPORATION and MILTON HARTMAN CORPORATION (Now Named HARTMAN CORP.), Respondents.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Fred J. Lauchli, Trustee in Bankruptcy of Hartman Corporation of America (a corporation), bankrupt, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the cause numbered 14,406, styled Milton Hartman et al., Appellants, v. Fred J. Lauchli, Trustee, Appellee.

JUDGMENT OF COURT OF APPEALS AND PETITION FOR CERTIORARI.

The judgment of the United States Court of Appeals was entered on February 4, 1952 (T. 30). Appellee-Petitioner's Petition for Rehearing was denied by said Court on March 10, 1952 (T. 39), and this Petition is filed within ninety (90) days after the entry of such order.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

This case is a suit in four (4) counts to compel the specific performance of a contract (Plaintiff-Petitioner's Exhibit B; R. 43-45, 38) to convey two pieces of improved real estate (R. 1-17).

During the early months of 1947, the Hartman Corporation of America, a Missouri corporation, found itself in financial straits. Its many creditors, exceeding three hundred in number, were pressing for payment (R. 119).

Milton Hartman, one of the Respondents, was the corporation's President and controlling stockholder (R. 116, 101). He directed and guided its corporate activities. Upon realizing the financial condition of the company, he sought the advice of George Delf, President of Atlas Tool, one of the company's largest creditors. As a result thereof, a plan was formulated wherein, amongst other things, the real estate in suit was to be transferred to some third party, forthwith, as a Trustee. If and when the creditors agreed to hold their claims in abeyance, such trustee was to transfer the properties to Hartman Corporation of America. If this did not happen, the trustee was to convey the properties back to Milton and Jane Hartman, owners of record of one of the properties, and to Du Voll Corp., record owner of the other (R. 68, 74, 75, 122).

At Hartman's instance, therefore, a meeting of the merchandise creditors of the corporation was called for July 1, 1947. Creditors holding claims aggregating $432,403.00 were in attendance (R. 39, Exhibit A, R. 38).

Milton Hartman appeared at the meeting with counsel, who, at such time, also represented the corporation and the Respondents, Jane I. Hartman (Milton Hartman's wife), and Du Voll Corp., a corporation (R. 47, 105, 106, 107, 122).

The stock of Du Voll Corp. was owned by Respondents Hartman (R. 99). Its corporate affairs were under the sole control and direction of Milton Hartman (R. 81, 82, 99, 100, 92, 93, 163).

Respondents' counsel read a prepared formal statement to the assemblage of creditors (R. 80, 122). Counsel was also its draftsman (R. 47). The substance of the statement was simple. Hartman Corporation of America, although not then insolvent (R. 39, 119, 120, 121), had to "buy" time. The statement, as read, provided, therefore, that if certain things were undertaken by a committee of the creditors, by Atlas Tool, and Hartman Corporation of America, etc., the Hartmans agreed to convey, or cause to be conveyed, forthwith, the two pieces of business real estate **to one Lauchli**, as Trustee (R. 64). In the language of the offer, Lauchli was to transfer these properties **to Hartman Corporation of America** when it was "apparent that all of the Creditors" were "in accord with" and would "abide by this plan."

The offer, as read by counsel, was verified and confirmed at the meeting by Milton Hartman (R. 47).

The creditors, in accordance with the statement, immediately elected a Creditor's Committee. The committee began its functions forthwith (R. 48).

Counsel's statement was then reproduced by a process known as multilithing, and was thereby transformed into Plaintiff's Exhibit B. (R. 38, 43; a photostatic copy of Exhibit B is contained in the Supplemental Record of Petitioner, on pages 23-27). A copy of this letter, dated July 7, 1947, was mailed to each of the corporation's merchandise creditors. It bore the signatures of Milton Hartman, both individually and as President of Hartman Corporation of America. It also bore the purported signature of Jane I. Hartman.

Exhibit B was accompanied by Exhibits A (a report of the July 1st meeting) and C (form of forbearance). (R. 38, 39, 45). Both were drafted by Lauchli. Lauchli was neither a creditor, nor was he an agent of Respondents. He was also not an attorney (R. 38-42, 45-46).

There is no reference in **Exhibit B** to any forbearance form, nor indeed, to the execution of any forbearance agreement. There is also no indication in the record that either Respondents' counsel or Milton Hartman mentioned a "forbearance agreement" at the July 1st meeting.

The "plan" was put into operation, immediately. The creditors held their claims in abeyance. All of the matters and things required by Exhibit B of the creditors, the Creditors' Committee, and all other persons and entities (excepting Respondents), were undertaken and performed as far as the terms of the offer would permit (R. 56-58, 68-70, 78, 84, 85, 168). Yet Respondents failed and refused to transfer the real estate to Lauchli.

The Creditors' Committee, accordingly, met upon August 20, 1947. Milton Hartman assured them that conveyance would be made immediately (R. 51-52, 68). The creditors continued to hold their claims. But conveyance wasn't forthcoming.

On November 25, 1947, the Creditors' Committee made one final demand upon Respondents to make a conveyance. Milton Hartman categorically refused to do so. The Committee determined upon reorganization proceedings and filed suit immediately (R. 68).

Following the meeting of November 25, Milton Hartman "discovered", for the first time, that he had forged his wife's signature to Exhibit B (R. 68, 83, 84).

The real estate had a book value of $205,000.00 (R. 58). Had these properties been conveyed, reorganization and bankruptcy could have been avoided (R. 72, 76, 86, 98, 146.)

Reorganization gave way to bankruptcy July 16, 1948.

Kenneth Teasdale, as Trustee in Reorganization, instituted this suit against Respondents in February, 1948. Upon the corporation's adjudication in bankruptcy, your Petitioner was appointed Trustee and was substituted as plaintiff in said cause.

Trial was had in the District Court without a jury.

Milton Hartman testified that he had signed his wife's signature to Exhibit B. Jane Hartman denied that she had signed the document.

Plaintiff, to support his case, introduced specimens of admittedly authentic signatures of Jane I. Hartman and Milton Hartman. He also introduced several specimens of the manner in which Milton Hartman wrote the name of his wife. These exhibits were:

> Exhibit G (R. 110). Minutes of Stockholders' Meeting of Du Voll Corp. bearing signature of Jane, which Milton admits is her genuine signature (R. 143).

Exhibit H (R. 115). $125,000 note bearing admittedly authentic signature of Jane (R. 143).

Exhibit I (R. 115). Deed of trust bearing admittedly authentic signature of Jane (R. 143).

Exhibit J (R. 144). Checks payable to Milton and Jane Hartman. Milton admittedly endorsed the name of Jane on some of those checks. At least one of that group, Milton testified, bore her genuine endorsement (R. 144).

Exhibit K (R. 150). Five specimens of Jane Hartman's genuine signature (R. 150).

Exhibit L (R. 150). Five specimens of the "signature" of Jane as written by Milton (R. 150).

Neither side offered any expert testimony.

The trial court found: that Jane I. Hartman had executed the letter of July 7th, containing the offer to the creditors; that said Exhibit B contained **all** of the elements of said offer, which consisted of two distinct and separate steps; that step one of said offer consisted of the elements contained in said letter, as enumerated on pages 166-168 of the Record, i. e., putting "the plan" in operation, as required therein; that step one was accepted on or before August 1, 1947, by the undertaking and performance of the several acts so enumerated, by the creditors acting by and through the Creditors Committee and by the acts of Atlas Tool, Hartman Corporation of America, etc.; that thereupon Respondents became obligated to transfer, forthwith, said properties to Lauchli, as Trustee; that the creditors were not obligated to execute forbearance agreements until after the properties had been conveyed to Lauchli; that Respondents' failure and refusal to do so caused and precipitated the Chapter X proceedings; and that, absent such default, the said Lauchli, as Trustee,

could and would have been bound to convey said real estate to Hartman Corporation of America, as required by Step 2 of said offer (R. 168-170).

The District Court, therefore, divested the title of record to said properties from Respondents and vested same in the bankrupt corporation (R. 172-175).

Upon appeal, the judgment and decree of the District Court was reversed. The Court of Appeals ruled that the basic findings of fact and conclusions of law of the trial court were without evidentiary support, were contrary to law, and were clearly erroneous. (The finding that Du Voll Corp. was the "alter ego" of Milton Hartman was not assailed.)

JURISDICTION TO REVIEW.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under **Section 1254** of the Judicial Code (Act of June 25, 1948, Chapter 646, 62 Stat. 928, 28 U. S. C. A. 1254).

STATUTES INVOLVED.

The following Federal statutes are involved:

(1) **Rule 52 (a)**, Tit. 28, U. S. C. A. (1948):

> "**In all actions tried upon the facts without a jury . . . the court shall find the facts** specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; . . . **Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses** . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings

of fact and conclusions of law appear therein . . ." (Emphasis ours.)

(2) **Section 1652**, Tit. 28, U. S. C. A. (1948):

"**The laws of the several . . . states . . .** shall be regarded as **rules of decision** in civil actions in the Courts of the United States . . ." (Emphasis ours.)

(3) **Section 1731**, Tit. 28, U. S. C. A. (1948):

"The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

The following State statute is involved:

(4) **Section 490.640**, R. S. Mo. (1949):

"Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and **such writings** and the evidence of witnesses respecting the same **may be submitted to the court** and jury **as evidence of the genuineness or otherwise of the writing in dispute.**" (Emphasis ours.)

DECISION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals has not yet been reported. It is printed on pages 5-29 of the Transcript.

The Court of Appeals held:

(1) That, the handwriting specimens notwithstanding, the Trial Court's finding that Jane I. Hartman executed the July 7th letter (Exhibit B) was "clearly without evidentiary support," and that neither **Section 490.640**, Revised Statutes of Missouri, nor any Missouri decision construing that statute, sustained such finding (T. 23-26).

(2) That the July 7th letter was to be read with **two other** instruments, and that the obligation of Respondents to convey **to Lauchli** was conditioned upon each of the creditors of the corporation executing a forbearance agreement; "that there was no evidence to support the court's finding and conclusion of a completed and binding contract for the transfer of the two pieces of real estate" to Lauchli, as trustee (T. 26-27).

(3) That, even had the properties been conveyed to Lauchli, the condition upon which Lauchli was to convey to the corporation never occurred and, now, could never occur; that "the conclusion . . . that Lauchli could and would have conveyed to the company pursuant to the trust if conveyance had been made to him was contrary to and not supported by the evidence and "was clearly erroneous" (T. 28-29).

It is submitted that in each of these holdings the Court erred. And Petitioner respectfully requests this Court to examine the record and make its own determination of each of these matters.

QUESTIONS PRESENTED.

The questions presented in this case are:

(A) **Whether Jane I. Hartman signed Exhibit B.**

1. Does not **Section 1652** (Tit. 28, U. S. C. A.), and the case of **Erie Railroad Company v. Tomkins**, 304 U. S. 64, 78, 82 L. Ed. 1188, **compel** the Court of Appeals to follow **Section 490.640** of the Missouri Statutes (Mo. R. S. 1949), as well as the decisions of the highest court of the state construing that statute, which said statute and decisions declare that the introduction of **specimens of handwriting** of a person, for comparison with a disputed writing, **without**

any expert or other testimony concerning the same, constitutes **substantial evidence**?

2. Can a Court of Appeals, notwithstanding the clear injunction of **Rule 52 (a)**, substitute its judgment, on an issue of fact, for that of the trial court, when there is substantial evidence to support the latter court's finding?

3. Does **Rule 52 (a)** (Tit. 28, U. S. C. A.) enjoin the trial court to set forth the **bases** for each of its findings of an ultimate fact?

4. Can a Court of Appeals upset a finding of fact of the trial court when the party taking the appeal has neglected and failed to lay before the appellate court the evidence on which such finding was based?

5. Does a Court of Appeals have power to reverse a finding of fact concerning a matter on which the average layman would have little knowledge, for the reason that no expert testimony on such matter was offered in the lower court?

(B) **The Interpretation of Exhibit B.**

1. What was the proper interpretation and construction to be given to the July 7th letter, i. e., on what was conveyance to Lauchli conditioned; on what was conveyance by Lauchli to Hartman Corporation of America conditioned?

2. Whether the terms and conditions of **Respondent's** offer, as contained in the July 7th letter, could be enlarged by a consideration of the contents of Exhibits A and C, with which Respondents had nothing to do.

3. Whether there was substantial evidence to support the trial court's finding that step 1 of the offer had been accepted by the creditors, and that, thereupon, Respondents became obligated to convey to Lauchli.

(C) **Whether Lauchli could have conveyed to corporation.**

1. Whether there was substantial evidence to support the trial court's finding that Lauchli could and would have been obligated to transfer the properties to Hartman Corporation of America, had the properties been transferred to him.

2. Were the offerors (i. e., Respondents) excused from performance when they, by their own intentional conduct, made it impossible for the offer to be accepted within its original terms?

Petitioner respectfully requests this Court to review the record and determine each of these questions.

REASONS FOR ALLOWANCE OF THE WRIT.

Certiorari should be granted in the above cause for the following special and important reasons:

(A) **The Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions, contrary to the express dictates of Section 1652 (Tit. 28., U. S. C. A.) and the applicable decision of this Court, to-wit, Erie Railroad Company v. Tomkins, 304 U. S. 64, 82 L. Ed. 1188.**

The **Erie** case proclaimed that "the law to be applied in **any** case is the **law of the State.** And whether the law of the State shall be declared by **its legislature** in a **statute,** or **by its highest court in a decision,** is not a matter of federal concern."

The **legislature** of this State has declared that writings admittedly genuine may be submitted to the trier of facts "as evidence of the genuineness or otherwise of the writing in dispute" (**Section 490.640,** R. S. Mo. [1949], supra).

The **highest court** of this State has declared that such writings may be so submitted, "**without any expert or other testimony concerning the same**", and that such writings, when so introduced, constitute **substantial evidence.**

Weber v. Strobel (Mo.), 194 S. W. 272, loc. cit. 274;
Sanders v. North End Building & Loan Assn., 178 Mo. 674, loc. cit. 680, 77 S. W. 833;
See also **Klaus v. Zimmerman** (Mo. App.), 174 S. W. 2d 365, loc. cit. 369.

Your Petitioner (the plaintiff) introduced in evidence the several exhibits enumerated on page 5, supra.

The court acknowledged the introduction of such evidence, but pointedly observed, "**But the plaintiff called no handwriting expert** to testify that the signature of Jane I. Hartman on Exhibit B was in her handwriting or that it was not in the handwriting of Milton Hartman" (T. 24), and ruled that the trial court's finding was "**clearly without evidentiary support**" (T. 25).

In so doing, the Court of Appeals disdained both the statute **and** the local decisions. It also vitiated the injunction of the **Erie** decision.

(B) **The Court of Appeals so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.**

1. The Court disregarded the substantial evidence (i. e., the handwriting exhibits) in support of the District Court's finding that Jane I. Hartman had executed Exhibit B upon the ground that Petitioner, trustee of a bankrupt corporation, had failed to call upon a handwriting expert (T. 24). Furthermore, the Court **presumed** that if **any** expert **could** have testified in a way favorable to Petitioner, he would have been called (T. 25).

2. The Court of Appeals disregarded the substantial evidence (i. e., the handwriting exhibits) in support of the District Court's finding that Jane I. Hartman had executed Exhibit B upon the further ground that the "record fails to show . . . that the court's finding was based on any such comparison" of the signature appearing upon Exhibit B and upon the other handwriting exhibits (T. 25).

In so doing, the decision of the Court of Appeals is contrary to **Rule 52 (a)** and the prior decisions of that very Court, to-wit, **Skelly Oil Co. v. Halloway** (Mo. 1948), 171 F. 2d 670, loc. cit. 673, and **Brown Paper Mill Co. v. Irvin** (Ark. 1943), 134 F. 2d 337, loc. cit. 338, which declare that the trial court need find only the **ultimate** facts; that the trial judge is **not** required to record his mental processes in reaching a conclusion as to such **ultimate** fact.

3. The Court, in disregarding the foregoing exhibits, required that there be **direct oral testimony** to sustain the finding that Jane I. Hartman executed Exhibit B (T. 24-25). Such a condition is in conflict with **Section 1731**, Tit. 28 U. S. C. A. (supra), the decision of this Court in **Stokes v. United States**, 157 U. S. 187, loc. cit. 194, 15 S. Ct. 617, 39 L. Ed. 667, and the decisions of the Court of Appeals for the Fourth Circuit, to-wit: **Bowles v. Kennemore**, 139 F. 2d 541, loc. cit. 542, and **Citizens Bank & Trust Co. v. Allen**, 43 F. 2d 549, loc. cit. 550, all of which declare that **where a writing is in dispute, the trier of facts has the duty to compare** the handwritings in evidence, and to **determine** whether they are written by the same person.

4. The Court of Appeals violated the mandate of **Rule 52 (a)** providing, in part, that the **trial court** shall find the facts, and that such findings "shall not be set aside **unless clearly erroneous**, and due regard shall be given to the opportunity of the **trial court** to judge of the credibility of the witnesses."

The briefest scanning of pages 19-21 of the Court's opinion (T. 23-25) makes this violation self-evident.

The Court disdained the evidence of Petitioner. Instead, it summarized **all of the testimony of Milton and Jane Hartman**—persons whom the trial court had found to be perjurers. It indulged every presumption **in favor of** Respondents' evidence [contrary to the dictates of Rule 52 (a)], and, placing obvious credence in **their** story, abrogated the court's finding.

In so doing, the Court of Appeals, clearly, invaded the province of the District Court. It determined **for itself** the "credibility of the witnesses", contrary to the decision of this Court in **Walling v. General Industries Co.** (1947), 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088, loc. cit. 1092.

Furthermore, the decision fails to recognize that the trial court had the **inherent right** to disregard the testimony of any witness, **even though uncontradicted**, if satisfied that such witness was not telling the truth. The opinion is therefore in conflict with the decisions of the Courts of Appeals for the Seventh and Second Circuits, respectively, to-wit, **Sun Life Assur. Co. of Canada v. Stacks**, 187 F. 2d 17, loc. cit. 20, and **Broadcast Music v. Havana Madrid Restaurant Corp.** (N. Y. 1949), 175 F. 2d 77, loc. cit. 79-80.

5. The decision of the Court of Appeals is in conflict with the decisions of the Courts of Appeals for the Ninth and Seventh Circuits, respectively, to-wit, **United States v. Foster**, 123 F. 2d 32, loc. cit. 34, and **Carter Oil Co. v. Norman**, 131 F. 2d 451, loc. cit. 456, as well as its own prior decisions, to-wit, **Woods v. Western Holding Corp.** (Mo. 1949), 173 F. 2d 655, loc. cit. 656, and **Kattelman v. Madden** (Mo. 1937), 88 F. 2d 858, loc. cit. 861-862, all of which declare that the burden is upon the **appellant** to present a proper record to the Court of Appeals; and that if ap-

pellant **does not** present such a record as to enable the Court of Appeals to determine for itself whether a particular finding of facts **is** clearly erroneous, such finding imports absolute verity on appeal.

The Court of Appeals set aside the trial court's finding that Exhibit B bore the authentic signature of Jane I. Hartman, **even though** the record presented to that court by Appellants (Respondents) **failed to contain the very evidence on which such finding was based, i. e., the actual specimens of the handwriting of Jane and Milton Hartman.** (See exhibits enumerated on page 5, supra.)

6. The Court of Appeals, in holding that there was "no evidence to support the court's finding and conclusion of a completed and binding contract for the transfer of the . . . real estate . . . to Mr. Lauchli as trustee", ignored, and indulged every presumption against, the Petitioner's evidence in support of such finding and conclusion, and limited and conditioned the offer of Respondents, as contained in **Exhibit B**, by an examination of other documents neither referred to therein, nor prepared by the offerors or anyone acting on their behalf (T. 26, 27).

This is contrary to the obvious restrictions placed upon appellate courts by **Rule 52 (a)**.

PRAYER FOR RELIEF.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 14,406, Milton Hartman et al., Appellants, v. Fred J.

Lauchli, Trustee of Hartman Corporation of America, Appellee; that the said judgment of the said United States Court of Appeals be reversed by this Honorable Court; and that Petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

FRED J. LAUCHLI,
Trustee, Hartman Corporation of America, Bankrupt,
By KENNETH TEASDALE,
506 Olive Street,
St. Louis, Missouri,
Attorney for the Petitioner.

Of Counsel:

COBBS, BLAKE, ARMSTRONG,
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506 Olive Street,
St. Louis, Missouri.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion of the Court of Appeals has not yet been reported.

II.

PRELIMINARY STATEMENT.

The summary and statement of the matter involved, statement as to jurisdiction, statement of questions presented, as well as the statement relating to the reasons for the writ, appear in the foregoing Petition for Certiorari. To avoid repetition, they are, by reference, incorporated herein.

III.

ARGUMENT.

Summary: It is respectfully submitted that Certiorari should be granted in the above cause because the Court of Appeals decided an important question of local law in a way in conflict with applicable local decisions, and, otherwise, so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. **The Court of Appeals decided an important question of local law in a way in conflict with applicable local decisions.**

For many, many years the State of Missouri has had the benefit of a statute which covers precisely the basic question of fact presented in this case, namely, did Exhibit B (R. 43, 38) contain the authentic signature of Jane I. Hartman?

That statute (**Section 490.640**, R. S. Mo. 1949, set out on page 8, supra) provides that, where a writing is in dispute, the trier of facts may consider **specimens of handwriting** "as **evidence** of the **genuineness or otherwise** of the writing in dispute."

The highest courts of this State have spelled out the import of that statute. The Supreme Court of Missouri stated in **Weber v. Strobel**, 194 S. W. 272 (l. c. 274):

> "**Under (this) statute, and even prior to the statute, it has been held that the papers admitted to be genuine and the paper claimed to be forged may be submitted to the jury for comparison** WITHOUT ANY EXPERT OR OTHER TESTIMONY CONCERNING THE SAME (citing cases); and verdicts determining

the genuineness or otherwise of signatures were upheld when the **only** evidence admitted was such writings (citing cases)." (Emphasis supplied.)

More recently, the Missouri Court of Appeals, in **Klaus v. Zimmerman,** 174 S. W. 2d 365, loc. cit. 369, held that this statute **"necessarily** contemplates that the **standard** of **comparison** thus introduced in the case shall constitute **substantial evidence,** and the statute has been so interpreted by the Courts. **Sanders v. North End Building & Loan Ass'n,** 178 Mo. 674, 680, 77 S. W. 833; **Weber v. Strobel** (Mo.), 194 S. W. 272, 274."

Accordingly, Petitioner introduced in evidence the countless handwriting exhibits enumerated on page 5, supra. These exhibits contained the admittedly genuine signatures of Jane and Milton Hartman. Indeed, one such exhibit (i. e., Exhibit L, R. 150) even contained five specimens of the "signature" of Jane, as written by Milton.

What more could Petitioner do? Could he offer direct oral testimony on the subject? He could not. Even Milton Hartman hadn't "discovered" that he had "forged" his wife's name to the letter until November 25th, 1947, **after** his attorney had advised him that they only had a "50-50" chance of keeping the properties (R. 83).

No, Petitioner **had** to rely on handwriting specimens. By no amount of guile or cunning could he have been expected to induce the Hartmans to speak the truth.

Accordingly, Petitioner faced the problem and dealt with it as best he could under the circumstances.

And, **upon that evidence,** i. e., the handwriting exhibits, the District Court found that Exhibit B bore the genuine and authentic signature of Jane I. Hartman (R. 158).

Yet, the decisions of the highest court of this State notwithstanding, the Court of Appeals ruled that such finding was "clearly without evidentiary support."

If this decision be permitted to stand, **Section 1652,** Tit. 28, U. S. C. A. (set out at page 6, supra), becomes meaningless; the sacred mandate of this Court in **Erie Railroad Company v. Tomkins,** 304 U. S. 64, 82 L. Ed. 1188, stands desecrated.

In solemn tones this Honorable Court proclaimed (l. c. 78) . . . "the law to be applied in **any** case is the **law of the State.** And whether the law of the State shall be declared by **its Legislature** in a statute, or by **its highest court** in a decision, is **not** a matter of federal concern."

If this decision be permitted to stand, it will forever be evidence that, in some instances, at least, federal statutes may be flaunted, the decrees of this Court, spurned.

B. **The Court of Appeals so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.**

The briefest scanning of the opinion of the Court (T. 5-29) makes that self-evident.

The Court indulged **every** presumption **against** the findings and judgment of the trial court.

It refused to heed the many federal court decisions giving the directive Rule 52 (a) (Tit. 28, U. S. C. A., set out on page 7, supra) its full and proper meaning.

It completely departed from basic legal principles which have become irrevocably engrained in our system of judicial review.

1. **The Court disregarded the substantial evidence (i. e., the handwriting exhibits) in support of the District Court's finding that Jane I. Hartman had executed Exhibit B upon the ground that Petitioner had failed to call upon a handwriting expert** (T. 24-25).

The Court approached the question of whether the trial court's finding upon this point was clearly erroneous in a unique manner. Instead of determining what evidence there was to **support** that finding, the Court first summarized all of the testimony of the **Hartmans** (Appellants) which was **opposed** to such finding (T. 23-24).

It did concede that "examples of her handwriting were introduced" (T. 24).

Immediately thereafter, however, followed this startling comment:

> "**But** the **plaintiff** called no **handwriting expert to testify** that the signature **of Jane I. Hartman** on Exhibit B was in her **handwriting or that it was not** in the handwriting **of Milton Hartman. The earnestness** and care devoted **to the preparation and trial of the** case would tend to **impress that if an informed** and expert person COULD **have sworn that it was Jane's handwriting, such a one would have been called by the plaintiff**" (T. 24-25). **(Emphasis ours.)**

Such an amazing confession, **albeit frank, cries out** for the intervention of this Court. **Indeed, how else can so** improper and damaging an inference be combatted? What case law it will make.

Furthermore, it is erroneous. Petitioner is trustee of a corporation which has, for some years, been drained of assets by these very Hartmans. It is in bankruptcy. The funds of the Estate are limited, indeed, almost nil. An expert witness was never contacted.

Nor, it might be noted, did **Respondents-Appellants** put on an expert witness. Maybe **they** couldn't find one who would testify that Exhibit B did **not** contain the authentic signature of Jane I. Hartman.

The Court of Appeals clearly applied an incorrect principle of law in assessing the sufficiency of the evidence. Accordingly, this Honorable Court may itself examine the record and determine the sufficiency thereof.

O'Leary v. Brown-Pacific Maxon, 340 U. S. 504, 71 S. Ct. 470, 95 L. Ed. 483.

2. **The Court of Appeals disregarded the substantial evidence (i. e., the handwriting exhibits) in support of the District Court's finding that Jane I. Hartman had executed Exhibit B upon the further ground that the "record fails to show . . . that the court's finding was based on any such comparison" of the signatures appearing upon Exhibit B and upon the other handwriting exhibits** (T. 25).

The Court of Appeals, on several occasions, commented that there was no indication in the record on what the trial court's finding was based (T. 24, 25). And in rejecting **Section 490.640** (R. S. Mo. 1949, supra), the Court remarked that the record failed to show "that the court's finding was based on . . . (the) comparison" of handwriting exhibits (T. 25).

This is clearly in violation of Rule 52 (a), supra, which enjoins the trial judge only to set forth findings of the **ultimate** facts.

Indeed, it has long been reognized by that very Court of Appeals that the trial judge is neither required to render a recapitulation of all of the evidence on the point, nor to record his mental processes in reaching a conclusion.

Skelly Oil Co. v. Halloway, 171 F. 2d 670, loc. cit. 673 (Mo.);

Brown Paper Mill Co. v. Irvin, 134 F. 2d 337, loc. cit. 338 (Ark.).

3. The Court of Appeals, in rejecting the evidence of Petitioner (i. e., the handwriting exhibits), required that there be direct oral testimony to sustain the finding that Jane I. Hartman executed Exhibit B (T. 24, 25).

Section 1731 (Tit. 28, U. S. C. A., set out on page 6, supra) provides that writings, admittedly genuine, may be used, for comparison, "**to determine (the) genuineness**" of the handwriting in dispute. It does **not** provide that either party must call upon expert testimony. Nor does it require that there be direct oral testimony by some person who actually witnessed the signing.

The statute recognizes the fact that if there **were** witnesses to the signing there would **be** no dispute as to the authenticity of a signature.

It therefore squarely places the duty of determining the genuineness of such writing where it belongs: upon the trier of facts.

The absence of expert or other testimony was therefore immaterial. The trial court had the duty of comparing the handwritings in evidence and determining whether Exhibit B bore the authentic signature of Jane I. Hartman.

This Honorable Court recognized that duty in **Stokes v. United States,** 157 U. S. 187, loc. cit. 194, 15 S. Ct. 617, 39 L. Ed. 667.

The Fourth Circuit did likewise in **Bowles v. Kennemore,** 139 F. 2d 541, loc. cit. 542, and **Citizens Bank & Trust Co. v. Allen,** 43 F. 2d 549, loc. cit. 550.

The opinion of the Court of Appeals conflicts with those decisions.

4. The Court of Appeals violated the mandate of Rule 52 (a) providing, in part, that the trial court shall find the facts, and that such findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Court discarded all the evidence of Petitioner **in support** of the trial court's finding (T. 24).

Instead, it pointed up the testimony of the Appellants Hartman in opposition thereto (T. 23-25).

The Court observed: "Mr. Hartman testified he signed both names to it, his own and that of Jane, his wife . . ." (T. 23). It also remarked: "Mrs. Hartman testified positively that she did not sign the document . . ." (T. 24), and then concluded: "The surrounding circumstances shown are consistent with Mr. Hartman's statement as to how, where, and when he signed the name of his wife" (T. 25).

From the foregoing, it is apparent that the Court of Appeals "retried" the case and **substituted its judgment** for that of the trial court on this issue of fact.

Certainly this is not permissible under **Rule 52 (a)**.

The mandate of that rule is clear. In a non-jury case, it is the province of the **trial court** to appraise the credibility of witnesses. It is **that** court's office to determine what weight, if any, should be given their testimony.

This Honorable Court has so ruled.

Walling v. General Industries Co., 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088, loc. cit. 1092.

Moreover, the trial court has the **inherent right** to disregard the testimony of any witness, even **though uncontradicted**, if satisfied that such witness is not telling the truth.

The Court of Appeals failed to recognize this. It is therefore in conflict with the decisions of the Courts of Appeals for the Seventh and Fourth Circuits, respectively, to-wit, **Sun Life Assurance Co. of Canada v. Stacks,** 187 F. 2d 17, loc. cit. 20, and **Broadcast Music v. Havana Madrid Restaurant Corp.** (175 F. 2d 77, loc. cit. 79-80).

It has long been accepted that certiorari may issue to secure uniformity of decisions.

Forsyth v. Hammond, 166 U. S. 506, 17 S. Ct. 665, 41 L. Ed. 1095.

5. **The decision of the Court of Appeals is in conflict with the decisions of the Courts of Appeal for the Ninth and Seventh Circuits, respectively, as well as the Court's own prior decisions.**

It is well established, under **Rule 52 (a),** that the Appellant has the burden of presenting such a record to the appellate court as will enable that court to determine for itself whether any particular finding is, in fact, "clearly erroneous." If appellant **fails** to do so, that finding, on appeal, is **conclusive.**

Woods v. Western Holding Corp. (Mo.), 173 F. 2d 655, loc. cit. 656;

Kattelman v. Madden (Mo.), 88 F. 2d 858, loc. cit. 861-862;

United States v. Foster, 123 F. 2d 32, loc. cit. 34;

Carter Oil Co. v. Norman, 131 F. 2d 451, loc. cit 456.

The trial court, in the instant case, found that Exhibit B bore the genuine signature of Jane I. Hartman. That finding was based upon a comparison of the signatures appearing upon that letter with Exhibits G through L, containing admittedly authentic signatures of the Hartmans, as enumerated on page 5, supra.

Yet, not a single one of these all-important specimen exhibits was included in Respondents' Record.

But for Petitioner, even a specimen of Exhibit B would not have been before the Court (Appellee's Supplemental Record, pages 23 et seq.).

Yet, all of this notwithstanding, the Court of Appeals repudiated the finding of the trial court.

6. **The Court of Appeals, in holding that there was "no evidence to support the court's finding and conclusion of a completed and binding contract for the transfer of the . . . real estate . . . to Mr. Lauchli as trustee, ignored, and indulged every presumption against the Petitioner's evidence in support of such finding and conclusion, and limited and conditioned the offer of Respondents, as contained in Exhibit B, by a consideration of other documents neither referred to therein, nor prepared by the offerors or anyone acting on their behalf** (R. 46, T. 26, 27).

CONCLUSION.

From the foregoing, it is apparent that the Court of Appeals spurned the injunction of **Section 1652** (Tit. 28, U. S. C. A., supra), as well as the decision of this Court in the **Erie** case.

It is equally apparent that their decision vitiates completely the limitations placed upon courts of review by Rule 52 (a). Such courts do **not** have unbridled discretion.

If certiorari not be granted, it will mean that federal courts of appeals may ignore local law and the mandates of this Honorable Court.

It will mean that a court of appeals can, according to its whim, indulge every presumption **against** the findings of the court below.

It will mean that a court of appeals can require the introduction of expert testimony as a condition to sustention of any finding.

It will mean that an appellate court can, at its discretion, place the **burden** upon the **appellee** to sustain a finding of the lower court. And this, even though the appellant **has failed to include in the record any of the evidence upon which that finding was based.**

These are important matters, fundamental matters, matters which would go to the very roots of our system of judicial review.

This Court, above all, cannot permit this system to be breached. Petitioner believes that it will not do so, and that, accordingly, it will not suffer this decision to stand, for all to view, as authority that it can be so breached.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

FRED J. LAUCHLI, Trustee of Hartman Corporation of America (a Corp.), Bankrupt,
Petitioner,
vs.
MILTON HARTMAN, JANE I. HARTMAN, DuVOLL CORPORATION and MILTON HARTMAN CORPORATION (Now Named HARTMAN CORP.),
Respondents.

No. 739

RESPONDENTS' BRIEF AND SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' BRIEF AND SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURT BELOW.

The proceedings in the United States Court of Appeals for the Eighth Circuit, including the original opinion and the per curiam opinion entered upon overruling Petitioner's petition for a rehearing, are included in the transcript of the record heretofore filed herein (T. pp. 3 to 61).

II.

PRELIMINARY STATEMENT.

The petition for the issuance of a writ of certiorari should be denied for the reasons that it appears from a reading of the record, particularly the opinion of the Court of Appeals and the later per curiam opinion, that the errors charged by the Petitioners do not exist.

a. The Court of Appeals did not decide an important question of law contrary to the provisions of Sec. 1652 (Tit. 28, U. S. C. A.), or contrary to Section 490.640, R. S. Mo. 1949, but rather determined the sufficiency of the proof concerning the disputed signatures in accord with such law and in accord with the prior opinion of this Court in the case of U. S. v. U. S. Gypsum Company, 333 U. S. 364, 395.

b. The Court of Appeals did not disregard substantial evidence in support of the District Court's finding that Jane I. Hartman had executed Exhibit "B," but rather they found that such evidence was not and is not to be found in the record.

c. The Court of Appeals based its determination of the question as to whether a contract had ever been entered into upon well known fundamental principles of law, without indulging in any presumptions for or against either side.

III.

ARGUMENT.

A. It is insisted that the Court of Appeals, in its opinion, ignored the evidence presented to the District Court containing admittedly genuine signatures of Jane I. Hartman and signatures admittedly written by Milton Hartman. Petitioners have obviously overlooked that part of the opinion (T. p. 22) in which it is said that:

> "The specimen 'multilith' of Exhibit B, containing the genuine signature of Milton Hartman and the disputed signature of Jane I. Hartman, is included in the record here and the handwriting of the two names, written close to each other, shows similarity in the slant of the letters, their conformation, spacing and pressures. Certainly there is no such obvious dissimilarity as to suggest that they were not written by the same hand. **Mrs. Hartman was asked to sign her name a number of times, which she did, and other examples of her handwriting were introduced.**" (Emphasis supplied.)

Next followed, in the opinion, the part quoted on page 21 of Petitioner's Brief in which the Court found that no handwriting expert was called. Thereafter the Court went on to state the following on page 23 of the Transcript:

> "There is no indication in the record how the trial court reached its finding that Jane signed the document. There was no circumstantial evidence tending to show she signed. The surrounding circumstances shown are consistent with Mr. Hartman's statement as to how, where, and when he signed the name of his wife. The record shows simply the bare finding, which we think is clearly without evidentiary support. However disbelieving or suspicious of the testimony of the Hartmans the court may have been, the burden of

proving that Jane signed was on the plaintiff. The plaintiff simply failed to sustain that burden.

"Attempting to sustain the decree, the appellee stresses the Missouri statute, Sec. 1915, R. S. Mo. R. S. A. (id., R. S. Mo. 1949, Sec. 490.640), which provides:

" 'Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.'

"But the record fails to show that any comparison of handwritings was made by witnesses or that the court's finding was based on any such comparison. Certainly the finding could not have rested on comparison of the handwriting in Exhibit B which is before this court. Since the testimony of the Hartmans was that Mrs. Hartman had not signed the Exhibit, and since there was no proof that she had signed it, the finding that she had in fact signed her name to the Exhibit was clearly wrong. **United States v. U. S. Gypsum Company**, 333 U. S. 364, 395. We find no Missouri decision which supports such a finding under such circumstances.

"Inasmuch as the decree appealed from was rested directly upon the finding that Jane signed Exhibit B, it necessarily follows as a result of the avoidance of that finding that the decree must be reversed."

From the opinion it appears affirmatively that all of the evidence on the question was fully considered by the Court of Appeals upon which it found that "The plaintiff simply failed to sustain that burden."

B. The trial Court was clearly in error. The Court of Appeals treated the finding of the trial Court with extreme

thoroughness and kindness. The plain truth of the matter is that the finding of the District Court is based solely upon the presumption that Mr. and Mrs. Hartman both swore falsely, while the only specimens of the handwriting before the Court of Appeals sustains the truth of their testimony that she did not sign the document.

The claim that the "Court of Appeals disregarded . . . substantial evidence" on this point is clearly contrary to the record. Hence, there is nothing before this Court which could justify the issuance of the writ prayed for.

C. Petitioners also complain, in one single italicized sentence (Brief p. 26), that the record did not sustain the Court of Appeals in its finding that, under the law, the District Court erred in attempting to enforce a contract which did not exist. Regardless of the question as to whether either or both of the Hartmans had signed Exhibit B, there was no legal basis to warrant a determination that the offer of the Hartmans to transfer the real estate in question was ever accepted by the creditors of the Hartman Corporation. It never did become a binding or enforceable obligation.

The determination of this point by the Court of Appeals (T. p. 25) is as follows:

> "In this case the creditors did not consent to extend the time for payment of their debts during operation of the company in the proposed manner. The conditions on which it was promised that the property would be transferred to a trustee never arose. There was no contract to convey that ever became binding upon the signers of Exhibit B.
>
> "The theories upon which it was contended that it should be deduced that the Hartmans made a proposal to the representatives of the six creditors called a creditors' committee and that those gentlemen had done or refrained from doing something whereby an

acceptance of the proposal was accomplished so that an absolute contract came into existence binding the Hartmans to convey the real estate 'within a reasonable time' were all without merit. None of the members of the so-called creditors' committee nor the committee itself was in any position to insure continuation of company operations free from creditor interference for a single day. As shown by the evidence, some creditors actually brought suits against the company and all the others remained free to sue. The attempt to dissociate the offers to convey the real estate from the granting of extension of time by the creditors simply contorts the picture of the situation and of what occurred. There was no hope and no thought of trying to work the company out of its condition without forbearance agreed to by the creditors.

"The finding and conclusion that there was a contract entered into between the Hartmans and 'the creditors of the Hartman Corporation' for the conveyance of the real estate, as pleaded in the complaint, was not supported by evidence, was clearly erroneous and necessitates reversal."

Hence, something was still to be done by the creditors before the Petitioner could enforce Exhibit B against the Respondents. The efforts of the Creditors Committee and the offer contained in the disputed document were put forth in the firm belief of all concerned that an extension of time was the only alternative to early ruinous liquidation of the company. Each creditor was required to sign Exhibit C, a "Forbearance Agreement" (T. p. 14). One hundred thirty-six creditors, holding claims of $142,124.95, did not sign. The company was not given forbearance. It was put into reorganization, and, later, into bankruptcy.

Hence, there never was a contract. The Court of Appeals could not be in error about this and there is nothing to justify a review of its opinion and decision by this Court.

CONCLUSION.

We respectfully suggest that the petition for a writ of certiorari should be denied as it seems to be wholly without merit.

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